

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

VANESSA DUNDON, ET AL., on behalf of themselves and all similarly- situated persons, Plaintiffs, v. KYLE KIRCHMEIER, ET AL., Defendants.	No. 1:16-cv-406 DECLARATION OF THOMAS C. FRAZIER
--	--

I, Thomas C. Frazier, declare:

I am the retired Police Commissioner of the Baltimore Police Department. My first 28 years of law enforcement service were with the San Jose Police Department. There, I rose through the ranks to Deputy Chief, commanding every operational bureau of the department, as well as Internal Affairs, Planning and Research, and Special Operations. It was in Special Operations that I commanded SWAT, Hostage Negotiations, Bomb Squad, and K-9.

In 1994, I took charge of the Baltimore Police Department, one of the fifteen largest police departments in the nation. As Police Commissioner, I was in command of over 3100 sworn and 800 non-sworn members. I served in that position for six years, in overall command of all types of events to include national security issues, crowd control events, parades, public gathering of up to 250,000 people, hostage situations, and violent crimes, including at least 300 homicides annually for the six years I was Police Commissioner. I then transitioned to the U.S. Department of Justice (DOJ) as Director of the Office of Community Oriented Policing from 1999 to 2001, where I directed a \$10 Billion federal grant program, DOJ's Office of Community Oriented Policing Services. I also became Executive Director of the Major Cities Police Chiefs Association (MCC) from 1999 to 2009. MCC is an association of the 75 largest police department in the country.

I was appointed by federal courts to serve on the Independent Monitor Teams overseeing the Department of Justice's Los Angeles and Detroit Consent Decrees, and as Compliance Director for Oakland, California's Negotiated Settlement Agreement. I performed after action studies and reports analyzing the law enforcement response to demonstrations and riots for the Department of Justice in Ferguson, Missouri, and for the City of Oakland. I personally observed highly volatile demonstrations involving thousands of people in "Occupy Oakland". My background and experience qualifies me to objectively review and assess the events that transpired immediately north of the Standing Rock Sioux Reservation in North Dakota in 2016.

I have read both the Plaintiff and the Defendants' Memoranda in Support and in Opposition to Plaintiffs' Motion for Preliminary Injunction; the Affidavits of LE-3, LE-4, LE-2, LE-1, FO-1, FO-2, and Cody Larson; and the Statement by Standing Rock Medic and Healer Council, <https://www.facebook.com/MedicHealerCouncil/posts/1035494333243056>.)

I have viewed the following videos:

- <https://www.facebook.com/DigitalSmokeSignals/videos/10155452982334746/>
- <http://www.unicornriot.ninja/?p=11191>
- <https://www.youtube.com/watch?v=jVNm9zGdYUI>
- <https://www.dropbox.com/s/7gxhcq1xq58zla6/NKDA9841.MOV?dl=0>
- https://www.dropbox.com/s/ktr5iy7a20y48ub/20161120_Bridge_WaterCanon_Teargas_RubberBullets.mp4?dl=0

The following are my observations and opinions held within a reasonable degree of professional certainty, based on my research and experience regarding my review of the material provided on this case:

I agree with the Defendants' characterization of the demonstrators as overall genuinely well-intended and gentle people, excluding a small percentage who were prepared to try to stop the pipeline at any cost. This is not an uncommon dynamic in demonstrations of various types in similar events across the country. The challenge to responding law enforcement is how to organize and equip an appropriate law enforcement response to those who are willing to break the law while not casting a broader net. Law enforcement wants to ensure they don't make unlawful arrests and injure the innocent, elderly, young, and law abiding citizens who are exercising their rights of freedom of assembly and speech. I have witnessed full-blown riots, and their results, in other jurisdictions. I have seen the widespread property damage, rampant

looting, and mass arrests that result from a true riot. I did not see that in any of the videos I viewed regarding Standing Rock, or described in the law enforcement affidavits concerning November 20, 2016.

In my professional opinion the Defendants' representation that what happened on November 20, 2016 near Standing Rock was a riot is overstated and inaccurate. It was, by and large, a crowd control event. By that I mean there were a handful of protestors whose intentions were to challenge law enforcement authority and cross police lines. They threw objects and attempted to breach the concertina wire and move the vehicle on the bridge. The one person able to cross the concertina wire was immediately arrested. The bulk of the protestors were there to protect tribal lands and sacred religious sites. Though present, these persons did not challenge law enforcement, were prayerful, and not assaultive in any way and there was, therefore, no justification to use force on them. Even assuming that there were persons on the front line who were throwing objects or otherwise posing a physical threat to the police, the reach of law enforcement's shoulder fired weapons and the water cannon were from 25 to 100 yards, an expansive area which encompassed and reached protestors who had no intention of challenging the line of law enforcement. The reach of these weapons ensured that individuals outside any zone or area that even could be considered to be directly confronting law enforcement could be and was subject to serious bodily injury. This is contrary to modern law enforcement standards for use of force.

This is particularly true with the water hose or cannon where blunt force trauma is an issue, as is hypothermia and other injuries related to below freezing temperatures. My review of the videos and the briefs written by both Plaintiffs and Defendants indicate that aside from a handful of people who threw back teargas canisters or other objects at the police, the only arguable weapons that may have been in the possession of protestors were knives, hatchets and propane canisters, all appropriately used for camping. Absent their use in an assaultive way, their presence is not noteworthy. My review of the facts of the case indicates that they were not used by the protestors in any assaultive fashion. But even if this were so, it is clear that most of the crowd was not involved in any such behavior, and the police were well protected behind the barricade. The proper response to individual crimes is to arrest the perpetrators, not inflict physical punishment on the entire crowd.

As the number of campers increased at the demonstration, so did the number of law enforcement officers. This is relevant since my review indicated that law enforcement was at no time out numbered or endangered. On the night of November 20, 2016, the triple row of coiled concertina barbed wire made crossing into law enforcement protected space almost impossible. If any protestor were able to breach the concertina wire, there were adequate law enforcement officers on the skirmish line to effect an immediate arrest.

It is true that law enforcement never knows if additional reinforcements will be needed. That was the case on November 20th when law enforcement, correctly or incorrectly, felt overmatched and called for emergency reinforcements. It is notable that reinforcements did arrive expeditiously and in a timely manner and were successfully able to carry out their law enforcement duties. Perhaps the true nature of the protest is best demonstrated by the fact that, despite the Defendants' claim that the protest was out of control, only one arrest was made and there was only one minor injury to an officer.

I want to address the use by law enforcement of weapons they characterize as "less than lethal". To properly and correctly use less lethal munitions such as "Instantaneous Blast CS Grenades" training and discipline of the officers charged with their use is required. I question whether the training given to law enforcement was adequate. I raise this as an issue given the nature and extent of injuries that law enforcement using those weapons inflicted on protestors.

For example, one young female protester was struck in the arm with an exploding munition and may lose an arm. Another woman has lost vision in one eye due to law enforcements' use of a less than lethal weapon. According to medical personnel present, protestors suffered additional injuries on November 20, 2016 as a result of law enforcements' use of these weapons. The injuries include hypothermia, head wounds, lacerations, and internal bleeding. 26 people were sent to hospitals.

Law enforcement's unnecessary use of these weapons and the resulting serious injuries from their use are important reasons which justify the Plaintiffs' request that this Court prohibit the reckless use of the these weapons. If the victims of these weapons had violated the law, there were enough law enforcement officers present to arrest them. Therefore, there exists no reasonable justification for their use.

Additionally, the use by law enforcement of shotgun fired bean bag rounds, as seen in video supplied to me by the plaintiffs, is excessive. These are highly dangerous weapons which

should never be used indiscriminately in a crowd, yet that is exactly what I saw based on the video evidence. It is inappropriate and excessive force to shoot beanbag rounds, or to launch direct impact sponge rounds, into a crowd for the purpose of crowd dispersal. Launched munitions, including explosive grenades, gas, and smoke canisters, with their high trajectory, as evidenced by the video, landed far behind protestor lines, injuring persons on the periphery of the protest who were clearly not advancing on the police. This too was an unnecessary use of force, and was also likely responsible for many of the fires reported by law enforcement. Also, when an emergency call for assistance is broadcast, the level of training of responding officers is unknown and thus use of specialty impact munitions, explosive grenades and other weapons that require specialized training is contra-indicated.

I have never seen, in any other American city or county, the use of water hoses or a water cannon against a United States citizen for any reason although I have read about this occurring in the early 1960s against civil rights marchers. The brute force of the impact of the water jet is a force option that would not be considered appropriate by most modern police chiefs or sheriffs, or tolerated by their citizenry. In this case, the use of this device in sub-freezing temperatures, in my opinion, serves no reasonable purpose and can only be considered a retaliatory and punitive action. Not only can the water jet cause injury when applied at such short range, but the water was also subsequently sprayed in a wide arc and far behind protestor lines, seemingly to get as many protestors wet as possible. The video evidence shows indiscriminate use of the water on peaceful protesters who were not being aggressive towards the police. In the sub-freezing weather, its use was certain to cause hypothermia, which it did. It was reported that approximately two dozen people were hospitalized for hypothermia on the night in question. This was an obvious and predictable outcome of the use of the water jet. Further, it was clearly intentional, and unnecessary on the part of the law enforcement decision makers.

In addition, although I would never condone use of hoses or water cannons on protesters, or indiscriminate use of impact munitions on a crowd, if the intention was crowd dispersal, such use should have ceased as soon as it became apparent that it was not having the desired effect. Law enforcement should distinguish between persons who attack the police or actively resist arrest, and protesters who disobey dispersal orders as an act of symbolic civil disobedience. There is no legitimate reason to continue using force on demonstrators who are simply nonviolently disobeying a dispersal order once it is clear that they are determined to hold their

ground until arrested. The only proper police response is to make arrests – not to deliberately inflict physical punishment.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of January, 2017, at Penngrove, California.

A handwritten signature in cursive script, appearing to read "Thomas Frazier".

Thomas C. Frazier
Frazier Group LLC